UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 9

In the Matter of

MASSEY ENERGY COMPANY AND ITS SUBSIDIARY, SPARTAN MINING COMPANY D/B/A MAMMOTH COAL COMPANY

and

Case 9-CA-42057

UNITED MINE WORKERS OF AMERICA

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF TO THE BOARD ON THE SINGLE EMPLOYER ISSUE

The Board has asked the parties to address three issues in this case:

- 1. Given the procedural circumstances of this case, does the Board have the authority to consider whether Massey and Mammoth constitute a single employer under existing Board law?
 - 2. If so, should the Board exercise its authority?
- 3. If the Board can and should consider the single-employer theory of liability, does the existing record in fact establish that Massey and Mammoth constitute a single employer?

I. THE BOARD HAS THE AUTHORITY TO CONSIDER WHETHER MASSEY AND MAMMOTH CONSTITUTE A SINGLE EMPLOYER:

Section 102.15 of the Board's Rules and Regulations requires only that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." In *In re Artesia Ready Mix*

Concrete, Inc., 339 NLRB 1224 (2003), the Board favorably quoted the Sixth Circuit decision in NLRB v. Piqua Munising Wood Products Co., 109 F.2d 552, 557 (6th Cir. 1940):

The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.

See also *Quanta*, 355 NLRB No. 217 (September 30, 2010). Furthermore, it is well settled that the Board may find respondent liable under a theory that, although not specifically alleged, "is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990); see also *Parexel Int'l LLC*, 356 NLRB No. 82 (January 28, 2011) and *Monroe Mfg., Inc.*, 323 NLRB 24, 26 (1997).

In the case at hand, the complaint alleges that Massey and Mammoth were agents of one another, although it did not specifically allege that they constituted a single employer. In Counsel for the General Counsel's opening statement, he argued that Massey took control of Mammoth's human resources functions, provided labor law services on behalf of Mammoth and that the two operations were "intertwined." (Tr. 29) Also, during the first day of trial, Counsel for the General Counsel referred to Massey and Mammoth as "one big ball of wax." (Tr. 159) Both in the complaint and in Counsel for the General Counsel's statements early in the trial, Massey and Mammoth were clearly given notice that the General Counsel was alleging that the two entities were related in a manner that could lead to one being held liable for the unfair labor practices of the agents and supervisors of the other. The ultimate question litigated at the hearing clearly was whether Massey and Mammoth could be held responsible for the unfair labor

practices of each other, regardless of whether this question was couched in terms of single employer, agency, parent/subsidiary, or "direct participation" liability. Both respondents had a full opportunity to mount whatever defense they desired to the underlying allegations as well as to the allegation that they were related in a fashion that could result in mutual liability for each others' unfair labor practices. At the close of the General Counsel's case, a motion was made to conform the pleadings to the evidence, thus again placing Respondents on notice that they should be prepared to defend against issues that weren't specifically plead in the complaint, but proved at trial. (Tr. 3810-3811)

Under Board precedent, the determination of whether two or more entities are sufficiently integrated to be deemed a single employer depends on all of the circumstances of the case, but focuses on whether the entities' total relationship reveals: (1) centralized control of labor relations, (2) common management, (3) interrelation of operations, and (4) common ownership. Radio Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965); Flat Dog Productions, Inc., 347 NLRB 1180 (2006). The Board has held that centralized control of labor relations is "of particular importance because it tends to demonstrate 'operational integration." RBE Electronics of S.D., Inc., 320 NLRB 80, (1995); Mercy Hospital of Buffalo, 336 NLRB 1282, 1283-1284 (2001). However, no single factor in the single-employer inquiry is deemed controlling, nor do all of the factors need to be present in order to support a finding of singleemployer status. "Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities." Flat Dog Productions, Inc., 347 NLRB 1180 at 1181-1182 (2006). Clearly, the key overarching factor in the single employer analysis is the ability of one entity to control the labor relation policies and operations of the other.

In Counsel for the General Counsel's Brief to the Administrative Law Judge, the General Counsel argued the single employer issue in detail. In defending against the allegation that Massey and Mammoth were agents of one another, both entities presented evidence and attempted to cite facts and law for the proposition that neither controlled the other. Counsel for Massey dedicated his entire opening statement to the issue of the parties' relationship and indicated that he was aware that liability may be imputed by a theory other than the agency theory advanced by the General Counsel. (Tr. 2117-2118) Indeed, at the conclusion of his opening statement, Massey's counsel claimed that "Massey Energy Company played no role as an agent or otherwise in effecting or attempting to effect any of the alleged discriminatory acts by Mammoth Coal Company which are relevant to this proceeding." (emphasis added) (Tr. 2118) Respondents' managers, Massey CEO Don Blankenship; Massey Regional Human Resources Director Jennifer Chandler; Massey Coal Services Director of External Affairs and Administration Jeff Gillenwater; and Mammoth Human Resources Manager Kevin Doss all testified in detail about the relationship of the two entities. Massey and Mammoth both dedicated significant portions of their briefs to this argument. See pp. 4-9, 13-21 of the Post Hearing Brief of Massey Energy Co. and pp. 34-38 of the Brief of Spartan Mining Co. d/b/a Mammoth Coal Co.

As Administrative Law Judge Bogas noted in footnote 9 of his decision in this case, "Massey's involvement in, and potential liability for, the alleged unfair labor practices has been fully litigated." As the Judge implicitly recognized, the facts underlying the various possible theories establishing Massey's liability are essentially the same; by litigating one theory, the parties necessarily litigated the others. Although the General Counsel did not file exceptions to the fact that the Judge did not explicitly rule on the single employer theory, there is no need to do

so under Board law inasmuch as the Judge found that Massey was liable for Mammoth's actions under a direct participation theory. See e.g., *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993). It is well settled that cross exceptions need not be filed to preserve an alternative theory of violation when the Judge has relied on another theory and has not passed on the fully-litigated alternative theory. *Id.* Since the single employer theory of liability was fully litigated and is closely connected with the theory alleged in the complaint, it is certainly within the Board's authority to consider and decide the single employer question.

II. THE BOARD SHOULD EXERCISE ITS AUTHORITY, IF NECESSARY, TO FIND MASSEY LIABLE UNDER A SINGLE EMPLOYER THEORY:

Although it is not necessary for the Board to decide the single employer issue because liability would flow to Massey under either the agency theory advanced by the General Counsel or the parent/subsidiary theory found by Judge Bogas, as explained above, it would certainly not be improper for the Board to consider the single employer theory. Indeed, if the Board views it as necessary to make a finding that both entities are a single employer in order to impart liability to Massey it should make such a finding. Massey and Mammoth were both on notice that the issue was in dispute and fully litigated the issue. It is clear from the evidence that Massey and Mammoth comprise a single employer and that each is thus jointly and severally liable for the conduct of the other.

III. THE EXISTING RECORD SUPPORTS A FINDING THAT MASSEY AND MAMMOTH CONSTITUTE A SINGLE EMPLOYER:

The analysis of whether two entities constitute a single employer focuses on whether the entities' total relationship reveals: (1) centralized control of labor relations, (2) common management, (3) interrelation of operations, and (4) common ownership. The existing record provides ample support for a finding that Massey and Mammoth constitute a single employer.

Centralized control of labor relations

According to Jeff Gillenwater, Massey Coal Services Director of External Affairs and Administration, the resource groups (of which Mammoth is one) are usually given a wage rate for a position which is set by senior managers and the Board of Directors. (Tr. 2127)

Gillenwater testified that the benefit package of employees is also set by senior managers and the board of directors. (Tr. 2137) Gillenwater clarified that he was referring to the Massey Board of Directors. (Tr. 2201) Gillenwater further testified that Blankenship or a compensation committee comprised of Massey board members set benefits. (Tr. 2201-2202) Blankenship himself testified that reimbursement packages for the different Massey operations, including Mammoth, are made by Massey - apparently and ultimately by him. (Tr. 1594-1595) Indeed, Blankenship appears to become personally involved in many details associated with the human resources function of Massey Coal Services – such as exploring a program related to driving mileage issues related to retention issues. (Tr. 2149-2150) It appears that everyone at the Massey coal operations is covered by the same pension plan. (Tr. 2195)

Even in day-to-day operations, Massey controls certain aspects of Mammoth's labor relations. For example, Kevin Doss' notes indicate that on February 23, 2005, Massey's Drexel Short directed that each Mammoth employee involved in a safety-related shut down of part of the mine due to ventilation issues sign an agreement assenting to adherence to a roof control plan. Drexel further ordered Doss to make certain that a suspension letter went into each such employee's file. (Resp. Mammoth Ex. 65, under 2-23-05 date.)

Common management

There is such an interrelation of managers between Massey and its subsidiaries, including Mammoth, that there often appears to be confusion as to who is doing what for which entity.

Blankenship exercises obvious control over all aspects of Massey's subsidiaries' operations. Gillenwater exercises control over various subsidiaries employment related matters. In general, Massey Coal Services is the Massey subsidiary providing such assistance as accounting, legal, engineering and human resources services to other subsidiaries. It essentially functions as an "internal consulting group" for the Massey resource groups. (Tr. 2133) Massey Coal Services personnel provides assistance to Mammoth and other Massey subsidiaries on compensation issues with an eye toward what is the appropriate compensation package in a particular geographic area. (Tr. 2136)

Interrelation of operations

All of Massey's operations are clearly integrated into the entity that is Massey. Mine Superintendent Ray Hall testified that the policies and procedures are the same from one Massey mine to another. (Tr. 2759) Massey simply does not differentiate itself from its operations. As just one example, all managers of the various corporate entities who testified in this matter have MasseyEnergyCo.com e-mail addresses (to wit, Dave Hughart, (Tr. 1604); Jennifer Chandler, (Tr. 1620); Jon Adamson, (Tr. 1656); Jeff Gillenwater (Tr. 2199); Kevin Doss (Tr. 2703)).

Common ownership

Massey is a publicly traded corporation. It ultimately owns Mammoth. Therefore, whoever owns Massey, is the owner of Mammoth.

IV. CONCLUSION:

Under existing Board precedent, the Board has the authority to decide whether Massey and Mammoth are a single employer inasmuch as Respondents were placed on clear notice that the relationship of the two entities would be at issue in the hearing of this matter. Because of this notice, General Counsel and Respondents put on extensive evidence regarding the relationship of

the two entities and used this evidence to argue their respective positions in the briefs. The evidence is more than adequate for the Board to now decide the single employer question and it should do so if it believes it necessary to decide the issue of Massey's liability since full and fair notice was given and the matter fully litigated. Inasmuch as a Section 10(j) injunction has been obtained in this matter, priority consideration is requested pursuant to Section 102.94 of the Board's Rules and Regulations.

Dated at Cincinnati, Ohio this 19th day of April 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 19, 2011

The undersigned hereby certifies that Counsel for the Acting General Counsel's Brief to the Board on the Single Employer Issue was served by electronic mail to the following persons:

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